Supreme Court, U.S.
FILED
OCT 9 1996

(3)

No. 96-201

In the Supreme Court of the United States

OCTOBER TERM, 1996

GARTH CONLAN, PETITIONER

v.

UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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63 pp

QUESTION PRESENTED

Whether a landowner may be held liable under Sections 203(a) and 503(a) of the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), 29 U.S.C. 1823(a) and 1853(a), where a tenant farmer uses a substandard building on the property as housing for agricultural workers.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 21a-31a) is reported at 76 F.3d 271. The opinion and order of the district court (App., *infra*, 1a-9a)[1] and the decision and order of the administrative law judge (ALJ) (App., *infra*, 10a-42a) are unreported.

JURISDICTION

The judgment of the court of appeals was filed on February 2, 1996. A petition for rehearing was denied on April 4, 1996. Pet. App. 32a. The petition for a writ

[1] Because petitioner did not include the complete decisions of the district court and the ALJ in his brief to this Court, both have been reproduced as an appendix to our brief.

of certiorari was filed on July 1, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case arose out of an investigation by the Secretary of Labor that culminated in a final decision by the Secretary imposing a civil monetary penalty on petitioner for violating the housing safety and health provisions of the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), 29 U.S.C. 1801 *et seq.* Pet. App. 24a. Section 203(a) of the MSPA provides that:

> each person who owns or controls a facility or real property which is used as housing for migrant agricultural workers shall be responsible for ensuring that the facility or real property complies with substantive Federal and State safety and health standards applicable to that housing.

29 U.S.C. 1823(a). Section 503(a)(1) of the MSPA provides that "any person who commits a violation of this chapter * * *, may be assessed a civil money penalty of not more than $1,000 for each violation." 29 U.S.C. 1853(a)(1).

2. Petitioner owns approximately 1500 acres of ranch land in Monterey County, California, which he farmed until 1984. At that time, petitioner filed a petition for bankruptcy, and, as designated debtor-in-possession, began leasing tracts of his property to approximately 40 tenant farmers. Petitioner also continued to occupy a personal residence on the property. Pet. App. 24a; App., *infra*, 32a.

In 1988, various county, state and federal agencies, including an official of the Department of Labor, entered the property pursuant to a search warrant,

which county officials had obtained after receiving complaints from neighbors concerning tent encampments on the property. The officials discovered migrant workers living in substandard conditions along the eastern edge of the property, primarily in shelters constructed of plastic sheeting and cardboard. Pet. App. 24a-25a; App., *infra*, 27a. There was no water or sewage system, and garbage, as well as sewage, had accumulated in the area. The investigators also discovered migrant workers living in a dilapidated and structurally unsound duplex on the southwest corner of the ranch. Pet. App. 24a-25a. Based on the investigation, the Department of Labor assessed $23,250 in penalties against petitioner for violations of numerous regulations promulgated under Section 203(a) of the MSPA, 29 U.S.C. 1823(a). Pet. App. 24a; App., *infra*, 11a-24a. Petitioner contested the penalties, and the case was set for hearing before an administrative law judge (ALJ).[2]

3. The ALJ found that the evidence established that migrant agricultural workers were living in the tents and duplex, and that housing conditions in those areas violated the housing safety and health standards of the MSPA. App., *infra*, 27a, 30a-31a. The ALJ rejected petitioner's contention that, although he was the owner of the property, he was not responsible for the violations because his property was used for housing workers without his knowledge or permission. *Id.* at 33a-39a. Rather, based on petitioner's own testimony that he had given one of his tenant

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[2] Although petitioner appears pro se in this Court, he was represented by counsel throughout the administrative proceedings and before the district court and the court of appeals.

farmers, Juan Marquez,[3] permission to use the duplex for himself and his irrigation workers if Marquez would make necessary repairs, the ALJ concluded that petitioner had sufficient knowledge of the intended use of the duplex to obligate "him to ensure that the duplex was not occupied by workers before the repairs were made." *Id.* at 33a-34a. More generally, the ALJ concluded that Congress intended to hold the property owner liable for substandard conditions of housing used by migrant workers, regardless of the owner's knowledge concerning the property's use. *Id.* at 34a-39a. Thus, the ALJ ruled that petitioner violated Section 203(a) of the Act, both with regard to the tent housing, about which the ALJ concluded that he had no knowledge, and with regard to the occupied duplex. App., *infra*, 34a-39a. The ALJ then upheld the proposed fine of $23,250, based on a consideration of the relevant factors. *Id.* at 40a-42a.

4. The district court affirmed the decision of the ALJ, App., *infra*, 1a, rejecting petitioner's contention that he could not be held liable absent proof that "he had knowledge of the migrant worker housing on his property." *Id.* at 4a. First, the court noted that rather than stating a knowledge requirement, the relevant language of Section 203(a) "connotes that the property owner is accountable for all migrant housing within the boundaries of his property." App., *infra*, 5a. In the court's view, because petitioner had a duty to prevent his property from being used as substandard migrant housing, and failed to do so, he

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[3] Marquez, who gave the migrant workers permission to live in the duplex, was not fined because he qualified as an exempt family farmer under 29 U.S.C. 1803(a)(1). Pet. App. 25a n.1.

permitted the property's improper use. *Id.* at 6a-7a. The court noted that placing such an affirmative duty on the property owner to police his property is both consistent with the MSPA's remedial purposes and fair to the property owner, who benefits from farming activities on his land. *Id.* at 6a. Finally, the court rejected petitoner's argument that a knowledge requirement is implicit in the MSPA's civil enforcement provision, MSPA § 503(a) (1), 29 U.S.C. 1853(a) (1). Contrasting the absence of any mention of scienter in that provision with the text of 29 U.S.C. 1851(a), which subjects a person to criminal penalties only if he "willfully and knowingly" violates the MSPA, the court concluded that Congress intended to impose civil liability without regard to scienter. App., *infra*, 7a.

5. The court of appeals affirmed in part and reversed in part. Pet. App. 21a-31a. First, the court held that Section 503(a), 29 U.S.C. 1853(a), which provides for civil penalties for violations of the Act, includes no scienter requirement. Pet. App. 26a-27a. Thus, the court concluded that petitioner could be held liable under Section 503(a) if he violated Section 203(a), 29 U.S.C. 1823(a). Pet. App. 27a.

Turning to Section 203(a), the court stressed that a property owner may be held liable only if his property was used as housing "for," and not merely by, migrant workers. Pet. App. 28a. In the court's view, the preposition "for" indicates that in order to constitute a violation, the housing must be provided to the migrant workers by someone in control of the facility or property. *Ibid.* Applying that interpretation, the court concluded that petitioner was correctly penalized for the conditions in the duplex, since the record established that his tenant, Marquez, had used the

duplex as housing for migrant workers. *Ibid.* By contrast, since petitioner did not provide the tent housing, and there was no evidence that any of his tenant farmers did so, the court concluded that petitioner was erroneously penalized for the housing conditions at the camp. *Id.* at 28a-29a.[4] Although the court noted that "[t]here may be circumstances in which someone who controls real property or a facility can be said to be using it to house migrant workers although the workers initially trespassed on the land," the court concluded that such is not the case where an owner is, "in good faith," unaware of such trespassers. *Id.* at 29a. Viewing this as such a case, the court remanded to the district court to recalculate the penalty to reflect only the violations at the duplex. *Id.* at 30a-31a.

ARGUMENT

The court of appeals correctly held petitioner liable for housing conditions at the duplex. That decision does not conflict with any decision of this Court or of any other court of appeals.[5] Accordingly, further review is unwarranted.

1. The court of appeals reasonably construed the language of Sections 503(a)(1) and 203(a) of the MSPA

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[4] In light of its understanding of 29 U.S.C. 1853(a) and 1823(a), the court of appeals then rejected petitioner's argument that those provisions are unconstitutionally vague. Pet. App. 29a-30a. In the court's view, petitioner "was adequately warned that to avoid liability under section 1823(a), he was required to prevent his tenant farmers from using his facilities or real property to house migrant workers under substandard living conditions." Pet. App. 30a.

[5] The court of appeals correctly noted that the issue presented was one of first impression. Pet. App. 26a.

to allow the Secretary to impose civil penalties against petitioner for substandard conditions in the duplex. The court's interpretation of Section 503(a)(1) gives effect to the plain language of that Section, which (unlike the criminal provision, 29 U.S.C. 1851(a)) nowhere states that knowledge is required to establish a violation. Moreover, while the court's interpretation of Section 203(a) is somewhat narrower than the Secretary's, it is clearly reasonable to hold petitioner liable for conditions at the duplex, which he owned and which his tenant "used as housing for migrant agricultural workers," 29 U.S.C. 1823(a).[6]

The court's interpretation is consistent with the intent of Congress to "expand the protections related to housing for migrant agricultural workers" by placing the responsibility for such housing not only on the farm labor contractor, as was previously the case, but also on the owner of the property. See *Migrant and Seasonal Agricultural Worker Protection Act: Hearings on H.R. 7102 Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor*, 97th Cong., 2d Sess. Pt. 1, at 48 (1982) (statement of Robert B. Collyer, Deputy Under Secretary, explaining the Department of Labor's understanding of the housing provisions); see also H.R. Rep. No. 885, 97th Cong., 2d Sess. 7 (1982) (Section 203(a) should "be interpreted with the broadest possible meaning to ensure that the person who owns

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[6] While petitioner stresses that he had no knowledge that migrant workers were living in the duplex, the ALJ concluded, based on petitioner's own testimony, that he "had sufficient knowledge of the intended use of the duplex to satisfy the 'scienter' requirement he reads into the Act." App., *infra*, 34a.

or controls the facility used as housing for migrant agricultural workers and their families is responsible for maintaining that facility in compliance with all substantive Federal and State safety and health standards"); compare *Bennis* v. *Michigan*, 116 S. Ct. 994, 1000-1001 (1996).

2. Petitioner contends that he has been unfairly held responsible for the acts of his tenant, Marquez, who is exempt from liability under the MSPA. Pet. 7. That contention is based on a misunderstanding of the nature of this proceeding. Contrary to petitioner's view, this action is not predicated on a theory that petitioner is vicariously liable for the acts of Marquez. Rather, it is based on the language in Section 203(a) that places responsibility on "each person who owns or controls" property that is used "as housing for migrant agricultural workers." 29 U.S.C. 1823(a). Because petitioner "owns" the property, it is irrelevant whether Marquez, as a "person who * * * controls" the property, is exempt from liability under the MSPA as a family farmer, 29 U.S.C. 1803(a)(1). See Pet. App. 25a n.1. Petitioner, as the owner, was personally responsible for ensuring that his property was not used while it remained in a dilapidated state, and the lower courts properly held that he cannot evade that responsibility by relying upon another's alleged promise to make the necessary repairs.

3. Finally, there is no merit to petitioner's assertion that the government failed to prove that anyone was living in the duplex, and failed to allow petitioner an opportunity to interview, cross-examine, or verify the existence of such individuals. Pet. 7. The ALJ found that the duplex was used to house migrant workers based on the written statement of a worker identified as Martinano Reyes, who stated that he

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worked for Marquez and lived in the duplex with 8 other people. App., *infra*, 29a-31a. Petitioner did not argue in the district court that the government failed to prove that anyone was living in the duplex, but instead argued that the evidence failed to establish that anyone living there was a migrant agricultural worker. See *id.* at 7a-8a. Moreover, petitioner raised no argument in the court of appeals about the existence or identity of migrant workers at the duplex, and the petition includes no such issue in the questions presented for review. See Pet. i. Accordingly, the issue does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

J. DAVITT MCATEER
Acting Solicitor of Labor

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OCTOBER 1996

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APPENDIX A

UNITED STATED DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-93-20226 RMW (PVT)

GARTH CONLAN, APPELLANT

v.

UNITED STATES DEPARTMENT OF LABOR, RESPONDENT

[APRIL 19, 1994]

ORDER AFFIRMING DECISION OF ADMINISTRATIVE LAW JUDGE

This case is before the Court for review of the final decision of the Secretary of Labor ordering Appellant Garth Conlan ("Conlan") to pay a civil penalty of $23,250.00 for violations of the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. 1801 *et seq.* For the reasons set forth below, the decision of the Secretary of Labor is AFFIRMED in its entirety.

BACKGROUND

Appellant Conlan owns a 1,500 acre ranch in Monterey County, California. In 1984, Conlan stopped farming the land himself and began leasing tracts of

the land to tenant farmers. In 1988, various government agencies received complaints from neighboring landowners concerning the existence of tent encampments on the Conlan ranch. Officials from the Department of Labor ("DOL"), the Monterey County Environmental Health Department, and other federal and state agencies conducted a raid of the ranch. The officials found substandard housing occupied by farm workers, including tents made of plastic sheeting and cardboard, along the eastern border of the property. Various occupants of the encampments were questioned. Officials also located a dilapidated duplex occupied by farm workers.

Based on evidence garnered from the search of the property, the DOL assessed a civil penalty against Conlan and his wife totaling $25,350.00[1] for numerous housing violations in contravention of Section 203(a) of the Migrant and Seasonal Agricultural Worker Protection Act ("MSPA"), 29 U.S.C. § 1823(a). The Conlans contested the penalty, and the case was referred to an Administrative Law Judge ("ALJ") for hearing.

At the hearing, the DOL introduced extensive evidence of substandard housing conditions on Conlan's property. Concerning the identity of the persons found on the property during the raid, the evidence showed that seven of those questioned worked on the property picking strawberries. Two of the workers stated their homes were in Mexico and that they were living in the tent encampments with six or seven other workers. Three of the workers stated that they resided in Watsonville, California. Another, Martiniano Reyes, said that he was from Mexico and

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[1] The amount of the penalty was later reduced to $23,250.

had been living in the duplex for fifteen days along with eight others. One of the workers questioned did not identity his place of residence. Another worker was found to be an illegal immigrant and was departed to Mexico on the day of the raid.

The ALJ found that the record demonstrated that the housing on Conlan's property violated the health and safety standards of the MSPA. The ALJ further found that the evidence established that the tents and the duplex were being used to house migrant agricultural workers. As a result of these findings, the ALJ ruled that Conlan violated Section 1823 of the MSPA, 29 U.S.C. § 1801 *et seq.*, and fined Conlan $23,250.[2] While the ALJ found no evidence showing that Conlan had knowledge that his property was being used to house migrant workers, the ALJ rejected Conlan's argument that liability under § 1823, enforced through § 1853(a)(1), requires knowledge of the migrant worker housing on the part of the landowner.

ISSUES ON APPEAL

Appellant presents three issues for appeal:

1. Under 29 U.S.C. § 1853(a)(1), is a landowner liable for substandard housing condition on his property despite having no actual knowledge that the property is being used to house migrant agricultural workers?
2. Whether the ALJ's finding that the occupants of the substandard housing on Conlan's property were migrant agricultural workers is supported by substantial evidence?
3. Whether the penalties assessed for the violations were excessive?

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[2] The ALJ found that Conlan's wife was not liable for the violations on the property.

STANDARD OF REVIEW

This Court reviews the ALJ's findings to make sure that the correct legal standards were applied and to insure that the findings are supported by substantial evidence. *Martinez v. Heckler*, 807 F.2d 771, 772 (9th Cir. 1986). Substantial evidence means more than a scintilla, but less than a preponderance. *McCallister v. Sullivan*, 888 F.2d 559, 601 (9th Cir. 1989). It means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Keyes v. Sullivan*, 894 F.2d 1053, 1055 (9th Cir. 1990).

DISCUSSION

1. *Knowledge Requirement of 29 U.S.C. § 1853(a)(1)*

Congress enacted the MSPA, 29 U.S.C. § 1801 *et seq.*, to protect the health and welfare of migrant farm workers. The provision of the Act relevant here, § 1823, regulates housing used by migrant workers. Section 1823 reads in pertinent part:

> [E]ach person who owns or controls a facility or real property which is used as housing for migrant agricultural workers shall be responsible for ensuring that the facility or real property complies with substantive Federal and State safety and health standards applicable to that housing.

Conlan contends that he cannot be held liable under § 1853(a)(1) for a violation of § 1823 unless the DOL proved that he had knowledge of the migrant worker housing on his property. In interpreting a statute, the starting point is the language of the statute itself. *Kaiser Aluminum & Chemical Corporation v. Bonjorno*, 494 U.S. 827, 835, 110 S.Ct. 1570, 1575 (1990).

The plain meaning rule requires that "if the statute is clear and there is no ambiguity, then there is not need to 'interpret' the language by resorting to legislative history or other extrinsic aids." *U.S. v. Neville*, 985 F.2d 992, 995 (9th Cir. 1993) (quoting *Church of Scientology of California v. U.S. Department of Justice*, 612 F.2d 417, 421 (9th Cir. 1979)).

The plain language of the statute does not support Conlan's interpretation. Section 1823(a) contains no language which can be construed as creating a knowledge requirement. The phrase "shall be responsible for ensuring" clearly connotes that the property owner is accountable for all migrant housing within the boundaries of his property. There is no suggestion in the statutory language that lack of knowledge of the migrant housing shields a landowner from the purview of § 1823(a). Had Congress intended knowledge of the migrant worker housing to be an element under subsection (a) it easily could have included language stating such a requirement. For example, Congress included knowledge as an element of other sections of the MSPA. § 1821(f) provides that "[n]o farm labor contractor . . . shall knowingly provide false or misleading information to any migrant agricultural worker . . ." (emphasis added). Similarly, § 1816 (a) reads that "[n]o farm labor contractor shall recruit, hire, employ or use, **with knowledge**, the services of any individual who is an alien. . . ." (emphasis added).

Conlan asserts that language contained in § 1823 (b)(1) implies that knowledge is required to prove a violation of the statute. Section 1823(b)(1), which adds specific duties to the general requirement to maintain safe housing imposed by § 1823(a), provides that no owner shall "**permit** [a facility] to be occupied by

any migrant agricultural worker" unless a copy of a certificate of occupancy issued by the state is posted at the housing facility. (emphasis added). According to Conlan, the term "permit" implies that the owner must have knowledge of the migrant worker facility. In support of this argument, Conlan cites Webster's New Collegiate Dictionary, which defines "permit" as follows: " 1) to consent to expressly or formally; 2) to give leave: AUTHORIZE; 3) to make possible, to give an opportunity: ALLOW."

Conlan reads too much into Congress' use of "permit". This term may reasonably be construed, in this context, as the failure to prevent an act from happening by not acquiring knowledge of the act in the face of a duty to do so. Statutes must be read as a whole and words should not be interpreted apart from the context in which they are used. *King v. St. Vincent's Hospital*, 112 S.Ct. 570 (1991). Conlan, as a landowner, had a duty to make sure that workers did not live in housing on his property which did not meet government health and safety standards. By remaining ignorant of the substandard housing, Conlan "permitted" the property to be occupied in violation of § 1823.

This interpretation is also consistent with the purpose of the MSPA. The overriding concern of the MSPA is the safety and welfare of migrant agricultural workers. A requirement that landowners take affirmative steps to ensure that no substandard housing is maintained on their property promotes this objective. Further, since the landowner directly benefits from the farming activities on his land, either by receiving rents from tenant farmers or by profiting from farming the land himself, it is reasonable to require him to ensure that the property is free of substandard migrant worker dwellings.

Finally, Conlan contends that although § 1853 does not specifically contain a scienter element, the civil enforcement provision of the MSPA, § 1853, should be read to require knowledge as an element of a civil violaiton. The court disagrees. Section 1853(a)(1) provides in part that "any person who commits a violation of this chapter or any regulation under this chapter may be assessed a civil money penalty of not more than $1,000 for each violation." This provision is devoid of language suggesting a scienter element. In addition, § 1851(a), the criminal enforcement provision, requires that a person may be subject to criminal penalties only if he "willfully and knowingly" violates the MSPA. The inclusion of a scienter requirement in the criminal enforcement provision indicates that Congress intended to do exactly what it did, i.e., omit a scienter element from the civil enforcement provision.

Sufficiency of Evidence

Conlan also argues that there was insufficient evidence to support the ALJ's finding that the workers living in the duplex were migrant agricultural workers as defined by the MSPA. The ALJ found that Martiniano Reyes, one of the workers living in the duplex at the time of the raid, was a migrant agricultural worker. Under the MSPA, a migrant agricultural worker is a worker "employed in agricultural employment of a seasonal or other temporary nature" who is "required to be absent overnight from his permanent place of residence." 29 U.S.C. § 1802 (8)(A).

In this case, substantial evidence supports the ALJ's conclusion that migrant agricultural workers inhabited the duplex on the Conlan ranch. The evidence showed that Reyes harvested strawberries on

the Conlan's property and that Mexico was his permanent place of residence. The harvesting of strawberries is employment of a seasonal or temporary nature, and Reyes was required to be absent overnight from Mexico while working on the ranch.

Conlan asserts that Reyes was a permanent employee, not a seasonal worker, who had been employed continuously for one year at the time of the raid. However, the Labor Department's MSPA regulations make clear that any type of "field work" qualifies as seasonal employment within the meaning of the MSPA, regardless of the duration of employment. 29 C.F.R. § 500.20(s)(4); *see also Caro-Galvan v. Curtis Richardson, Inc.*, 993 F.2d 1500, 1508 (11th Cir. 1993) (holding that the touchstone for seasonality is whether the employer is involved in field work). Since Reyes' job harvesting strawberries clearly constitutes field work, he was employed on a seasonal basis for purposes of the MSPA.

The ALJ's Penalty Assessment

Conlan contends that the evidence did not support the $23,250 penalty assessed by the ALJ. Conlan argues that only a token penalty should have been assessed given that he attempted in good faith to comply with statutory requirements and had never before violated the MSPA.

Under 29 U.S.C. § 1853(a), any person who commits a violation of the MSPA may be assessed a civil money penalty or a maximum of $1,000 for each violation. § 1853 (a) requires consideration of the penalized party's history of MSPA compliance and the gravity of the violation.

Conlan was fined $500 for each "aggravated" violation and $350 for each "serious" violation.[3] The penalties were well below the maximum amount which could have been assessed. The record indicates that the ALJ considered Conlan's prior compliance with the MSPA, his lack of knowledge of the offending housing, and his good faith attempt to comply with the Act. Accordingly, the ALJ applied the proper legal standard and substantial evidence supports the amount of the fine imposed.

CONCLUSION

For the foregoing reasons, the ALJ's decision is AFFIRMED.

IT IS SO ORDERED.

DATE: 4/18/94

/s/ RONALD M. WYTE
RONALD M. WHYTE
United States District Judge

[certificate of service omitted]

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[3] The classification of a violation as "aggravated" or "serious" depends on a number of factors set forth in the Labor Department MSPA regulations, including the gravity of the violation and the number of workers affected by the violation. 29 C.F.R. § 500.143 (b).

APPENDIX B

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
2600 MT. EPHRAIM AVENUE
CAMDEN, NEW JERSEY 08104

CASE No. 91-MSP-0037

IN THE MATTER OF: THE UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF

v.

LIGHTENING FARMS, AND GARTH CONLAN AND IONE CONLAN, RESPONDENTS

Date: March 9, 1993

Appearances: JEANNE M. COLBY, Esq.
JOHN M. GLYDER, Special Assistant to the Regional Administrator
For the Plaintiff

RICHARD T. TARRANT, Esq.
For the Respondents

BEFORE: ROBERT D. KAPLAN
Administrative Law Judge

DECISION AND ORDER

This proceeding arises under the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §1801, *et seq.*, (1983) (MSPA or the Act), and the implementing regulations at 29 C.F.R. Part 500.

On April 2, 1991, this case was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held in Seaside, California on May 13, 1992, and in Monterey, California on May 14 and 15, 1992, where the parties had full opportunity to present evidence and argument. This decision is based upon an analysis of the record, the arguments of the parties, and the applicable law.

I. Background

On August 11, 1988, twenty officials from the U.S. Department of Labor (DOL), the Border Patrol of the Immigration and Naturalization Service, the Hazardous Materials Section of the Monterey County Environmental Health Department, the Monterey County Sheriff's Department, and the Monterey County District Attorney's Office participated in a raid on parts of the 1505 acres of land located at 15740 Blackie Road, Castroville, California (the property). (GX A; TR 39-40)[1] A video tape of the area searched along the eastern boundary along Blackie Road was taken during this time. (GX B) Substandard housing for farm workers, including tents constructed of plastic sheeting and cardboard cartons, was found on the property. (TR 50-51) Approximately 70 photographs of these locations were placed in the record. (GX E, K)

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[1] Throughout this Decision and Order, "GX" refers to Government's Exhibits, "RX" refers to Respondents' Exhibits, "ALJX" refers to Administrative Law Judge's Exhibit, and "TR" refers to pages of the transcript of the hearing before the undersigned in May 1992.

On September 13, 1989, Plaintiff (hereinafter also referred to as Government or DOL) notified Respondents Lightning Farms, Garth Conlan and Ione Conlan (the wife of Garth Conlan) of the assessment of a civil money penalty of $25,500, subsequently reduced to $23,250,[2] for alleged violations of Section 203(a) of MSPA, 29 U.S.C. § 1823(a). (GS D)

The list which follows summarizes the violations cited by DOL.

VIOLATIONS OF MSPA STANDARDS[3]

HOUSING SITE (20 CFR §654.404)[4]

Housing located in proximity to conditions that create offensive odors, flies, noise, traffic, or similar hazards. (20 CFR §404(b))

-Tent housing in proximity to illegal dump, garbage pit.

-Feces, waste water and accumulations of trash, garbage, debris in the vicinity of the housing creating offensive odors,

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[2] Although DOL's letter dated September 13, 1989 assesses a civil money penalty of $25,500, when the individual penalties of $350 to $500 reflected in the margins of Form WH-519a are totalled the actual amount of the penalty is $25,350. That amount was further reduced post-hearing by $2,100 when six of the violations for cooking and eating facilities were eliminated because there was no evidence that the migrant workers lived in family units. Thus, the actual total penalty assessed is $23,250. (GX D, J; Government's Post Trial Brief)

[3] This list of violations is based on GX B, D, E and J, as well as testimony provided at the hearing of May 13 to 15, 1992.

[4] The standards of 20 C.F.R. §§ 654.404, *et seq.*, are applicable pursuant to 29 C.F.R. § 500.132.

flies and hazard to health. (GX E1 [RS 12], E 2 [RS 14]; TR 134)

Grounds not free from debris, poisonous plants, uncontrolled weeds, brush. (20 CFR 654.404(c))

-Housing constructed under and amidst brush.

-Accumulations of debris within the housing area. (GX E3-10 [JB-77, JB-39, JB-101, JB-102, JB-103, RS-9])

WATER SUPPLY (20 CFR §654.405)

Water supply fails to meet State Health Department Standards. (20 CFR 654.405(a))

-Unpermitted water system: water contained more bacteria than allowed by ordinance (less than 2.2 bacterial organisms per milliliter permitted). (TR 143) A sample taken at the "old ranch area" cold water tap produced results of 724,000 coliform bacteria per 100 milliliters of water. (EX P; TR 146-147)

Inadequate water supply. (20 CFR 654.405(a))

-Tents not supplied with water. (TR 150-151)

Cold water tap(s) not available within 100 feet of living unit which does not have water service within the unit(s). (20 CFR 654.405(b))

-Water line connected to the agricultural irrigation system supplied water to an outdoor bathtub. (TR 150-51)

EXCRETA AND LIQUID WASTE DISPOSAL (20 CFR 654.406)

Facilities not provided for effective disposal of sewage. (20 CFR 654.406(a))

-No approved method of sewage disposal on site. (TR 151)

-There were several dilapidated privies in the fields, and feces with toilet paper intermingled on the ground under several oak trees which were designated as a toilet area. These trees were twenty to forty feet from the makeshift housing. (TR 152)

Sewage facilities not maintained to provide effective disposal of sewage. (20 CFR 654.406(a))

-The toilet in one housing area was clogged and not working. (GX E10 (JG 88); Tr 160) In other housing areas there were no privies or toilets. (GX E2 (RS 12); TR 162))

Failure to connect to available public sewer systems. (20 CFR 654.406(b))

Privies or portable toilets not provided (where public sewers or septic tanks are not available). (20 CFR 654.406(c)).

-Unpermitted pit privies in use.

HOUSING (20 CFR 654.407)

Housing not structurally sound. (20 CFR 654.407)(a))

-Tent structures were built using scraps of wood and tree branches, and covered with visqueen sheeting used in the strawberry fields for crop and ground fumigation. (GX E1 (JB 79-82); TR 171-172)

-Staircase in the permanent house was collapsing and the floors were sloped, indicating that structural members were weakening and collapsing. (GX E (RS 1-5, RS 7, RS 9-11); TR 163)

-Walls in the permanent house were constructed of cardboard boxes. A kitchen ceiling was bowed and in the process of disintegration. The south staircase was in a state of collapse. Most of the rungs were missing. Structural beams of the house were in dilapidated condition and braced. The house had an uneven roof line and was in dilapidated condition. The porch roof sloped down. (GX E (JB 32, JB 37, JB 42-44, JB 49); TR 165-166)

Housing not in good repair (20 CFR 654.407(a)).

-Ceiling seams were not sealed, gas range lacked ventilation, a door did not fit properly, kitchen walls were buckled. There was a lack of exterior weather proofing (paint), some windows lacked screens. Debris was stored under the

porch. Some of the roofing was missing. The gas line from the tank into the house was too small. The plumbing vent pipes were too short. The house lacked exterior weather proofing. One window was boarded over. Window screens were missing. An exterior clothes washing machine drained onto the ground. An exterior door was damaged. Part of the exterior coating was missing. Bathroom ceiling was open and ceiling eaves were open to the outside. Walls were not smooth sealed and easy to clean. There was an accumulation of toilet paper on one side of the toilet. The toilet top was off, and the tank was empty. (GX E (JB 32, JB 38, JB 42, JB 44, JB 46); TR 166-168, 172)

Housing not maintained in a sanitary condition. (20 CFR 654.407(a))

-Toilet paper was scattered in the bathroom, surfaces in the bathroom were not cleanable. The toilet was inoperable. (GX E (JB 46); TR 169)

-In the tent area, trash, flies and feces were present in the immediate area. The tents were not "cleanable." (TR 172)

Housing does not provide protection against the elements (20 CFR 654.407(a)).

-Tent structures made of plastic sheeting. The wind was felt blowing through the cracks and bottom of the tents. (TR 172)

-In the house, the eaves were open, there was a lack of paint and the windows were boarded over. (GX E (JB 46); TR 167)

Floors in housing not of a smooth, rigid cleanable surface (20 CFR 654.407(b)).

-No floor, only bare ground in tents.

-The floors in the house were not of a smooth rigid cleanable surface. (GX E (JB 46-47); TR 168, 172)

Less than 60 square feet of floor space per occupant for combined cooking, eating and sleeping purposes. (20 CFR 654.407(c)(3))

-Partitions installed making floor space smaller than allowed.

-The tents did not meet the standard of 60 square feet per occupant: there was approximately 15 to 20 square feet per occupant. Bedding rolls were laid out wall to wall, with clothing, food, personal effects, and mail stored in some of the sleeping areas. (TR 172)

No facilities for hanging clothes and storing personal effects for each person or family. (20 CFR 654.407(f))

-Clothing was hung from trees within the housing area. (TR 173)

Ceiling height less than 7 feet for more than half of the floor area in each living unit. (20 CFR 654.407(g))

-Tent ceilings were less than 7 feet high. (TR 173)

Window space less than 10% of usable floor space. (20 CFR 654.407(h))

-The tents contained no windows. (TR 173)

Openings in shelter not screened with not less than 16 mesh material (20 CFR 654.408(a)).

-The tents contained no screens.

Three-quarters of the windows in the house lacked screens. Those windows with screens did not prevent the entrance of flies and mosquitos since the screens were rusted and torn. (TR 174)

No screen doors. (20 CFR 654.408(b))

-No screens on the three doors in the house. (TR 174)

HEATING (20 CFR 654.409)

No heating equipment in living quarters and service rooms (where temperature can fall below 68° F). (20 CFR 654.409(a))

-The tents were not heated. (TR 175)

-No heater was found in the house. (TR 175)

Stoves or other heat sources which require combustible fuel not properly vented. (20 CFR 654.409(b))

-A stove in the house was connected to an outside tank. Stove waste products were not vented in any manner. (TR 176)

ELECTRICITY AND LIGHTING (20 CFR 654.410)

No electricity provided. (20 CFR 654.410(a))

-The tents had no electricity. (TR 176)

Inadequate ceiling or wall-type light fixtures in all rooms. (20 CFR 654.410(b))

Electrical outlets not provided in each room of the house. (20 CFR 654.410(b))

Inadequate lighting for yard and pathways. (20 CFR 654.410(c))

No exterior lighting. (TR 177)

Wiring and lighting fixtures in an unsafe condition. (20 CFR 654.410(d))

-Unprotected wires, exposed splices and extension cord wiring in the house. Exposed power lines outside and within 100 feet of the house. An extension cord provided power to a clothes washer. Wires hung down from a power pole behind mobile units. An interior light fixture with unprotected wiring was mounted on a pole outside a travel trailer. Some wires between two of the units were low enough to touch. An exposed fuse panel with bare wiring was placed low on a

power pole. Wires which were not properly encased or protected were lying on the roof of a unit, and hung from the pole. (GX E (JB 56, 62-67, 69, 71); TR 177-179, 183-184)

Toilets not constructed, located or maintained in a manner to prevent nuisance or public health hazard. (20 CFR 654.411(a))

-The toilet within the house was not operative or maintained in an operative manner. The toilets serving the tents, i.e., the areas under the oak trees or adjacent privies, were not constructed or maintained to meet standards. (TR 186-187)

-Substandard pit privies in use.

Water closets or privy seats of at least one unit for each 15 occupants not provided. (20 CFR 654.411(b))

-The toilet in the house was inoperative. The alternate toilet served more than one house. (Government testimony revealed that this violation pertains only to the tent housing, and does not include the house at the "old ranch," as set forth in its answers to Respondents' interrogatories. (TR 187, 190-193; ALJX 1)

Toilet tissue not provided in common-use toilet facilities. (20 CFR 654.411(e))

-No toilet paper was provided in the tent housing. (TR 196)

Common use toilets and privies not well-lighted, ventilated or clean and sanitary. (20 CFR 654. 411(f))

Privy structures and pits not fly-tight. (20 CFR 654.411(i))

BATHING, LAUNDRY AND HANDWASHING (20 CFR 654.412)

Bathing and handwashing facilities not provided. (20 CFR 654.412(a))

-Persons were observed bathing in an outdoor bathtub. Water for the bathtub was heated by a campfire built under the tub. (TR 48, 51, 54)

Hot and cold water under pressure not provided for bathing and handwashing. (20 CFR 654.412(a)))

Bathing and handwashing facilities not maintained in a clean sanitary manner. (20 CFR 654.412(a))

Bathing and handwashing facilities not located within 200 feet of each living unit. (20 CFR 654.512(a))

Showerheads at a ratio of one per every 15 persons not provided (Shower heads are less than 3 feet apart). (20 CFR 654.412(b))

Shower area does not include 9 sq. feet of floor space per migrant worker. (20 CFR 654.412(b))

Adequate, dry dressing space not provided in common-use facilities. (20 CFR 654.412(b))

Shower floors not constructed of nonabsorbent, nonskid materials with proper drains. (20 CFR 654.412(b))

Except for family units, separate shower facilities not provided for each sex. (20 CFR 654.412(b))

Wash basins not provided in a ratio of at least one per every 15 persons. (20 CFR 654.412(c))

Laundry facilities with hot and cold water, under pressure, not provided. (20 CFR 654.412(d))

Laundry trays or tubs not provided in the ratio of at least one per 25 persons for washing machines in the ratio of 1 per 50 persons including 10 laundry trays per 100 persons. (20 CFR 654. 412(d))

COOKING AND EATING FACILITIES (20 CFR 654.413)

In family units, no space or equipment provided for cooking and eating. (20 CFR 654.413(a)).

The next five requirements to individual and common facilities for families:

Cooking space not provided with a cook stove or hot plate with a minimum of two burners (in a ratio of 1 stove or hot plate to every 10 people). (20 CFR 654.413(a)(1) and (b)(1).

Cooking space not provided with shelves or counter space. (20 CFR 654.413(a)(2) and (b)(2).

Cooking space not provided with mechanical refrigeration at a temperature of not more than 45°. (20 CFR 654.413(a)(3) and (b)(3))

Cooking and eating space not equipped with table and chairs commensurate with the capacity of the unit. (20 CFR 654.413(a)(4) and (b)(4)

In common facilities, sinks with hot and cold water, under pressure, not provided. (20 CFR 654.413(b)(5))

GARBAGE AND OTHER REFUSE (20 CFR 654. 414)

Fly-tight 20 gallon refuse containers not provided adjacent to housing unit, one container per every 15 persons. (20 CFR 654.414(a))

Refuse not collected at least twice a week or more often if necessary. (20 CFR 654.414(b))

-In the tent area a pit was used for trash and garbage. (TR 55) A can labelled hydraulic and transmission oil was found in the area of the tents and automobile. (TR 60) A number of aluminum cans were found on the ground. (GX B (5:59 p.m.); TR 63)

INSECT AND RODENT CONTROL (20 CFR 654.415)

Housing and facilities not free of rodents, insects or other vermin. (20 CFR 654.415)

SLEEPING FACILITIES (20 CFR 654.416)

Sleeping facilities not provided (beds, cots or bunks) for each person. (20 CFR 654.416(a))

Beds not provided with clean mattresses. (20 CFR 654.416(a))

FIRE, SAFETY AND FIRST AID (20 CFR 654.417)

Buildings used for sleeping or eating purposes do not meet safety and fire laws. (20 CFR 654.417(a))

Fire extinguishers not provided. (20 CFR 654. 417(f))

First aid facilities not provided. (20 CFR 654. 417(g))

Volatile or flammable liquids stored in or adjacent to living quarters. (20 CFR 654.417(h))

Pesticides and toxic chemicals stored in housing area. (20 CFR 654.417(i))

II. CONTENTIONS OF THE PARTIES

The Government contends that Garth Conlan is liable for the violations discovered on August 11, 1988 because he was the owner of the subject property or controlled it. Although DOL names Lightning Farms as a Respondent, the text of DOL's post-trial brief contains no reference to Lightning Farms or the question of its liability. The Government asserts that a relationship between the migrant farm workers housed on the property and Mr. Conlan existed through the tenant farmers who directly employed the workers on the property. While the Government acknowledges that Ione Conlan was not an owner of the property on August 11, 1988, it contends that she exercised control over the property.

The Government states that the penalty of $23,250 it seeks[5] is appropriate because the violations found on the property were substantive, and aggravated and serious. The Government asserts that factors to reduce the amount of the penalty were given due consideration, and that the amounts assessed were "fair and reasonable."

Respondents do not controvert that conditions existed on the property which would constitute the violations of the Act alleged by the Government. However, Respondents argue that the evidence fails to establish that the persons who were using the housing and other facilities were migrant agricultural workers. For the latter reason, Respondents contend that no violations of the Act have been proved.

Respondents contend that neither Lightning Farms nor Mrs. Conlan had any ownership interest in or control of the property on August 11, 1988 and, therefore, neither is responsible for the violations or penalties. Garth Conlan concedes that on that date the property "was owned by respondent Garth Conlan as a debtor-in-possession under the jurisdiction and control of the United States Bankruptcy Court." (Respondents' Post Trial Brief, p. 3) However, while conceding that the owner of a facility who permits it to be used for housing migrant farm workers is liable for violations of the Act, Respondents assert that Mr. Conlan is not liable because the property was occupied without his knowledge or permission.

Finally, Respondents argue that if strict liability is found applicable under the Act, the penalty imposed

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[5] See fn. 2, above.

for the violations the penalty should be only a token amount.

III. ISSUES

The issues presented for resolution are:

1. Whether the Government has established that conditions on the property on August 11, 1988 violated Section 203(a) of MSPA, 29 U.S.C. § 1823(a).
2. Whether Lightning Farms, Garth Conlan and Ione Conlan are liable for the violations of the Act which existed on the property on August 11, 1988.
3. Whether the penalties assessed for the violations are excessive.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Violations of the Act

Section 203(a) of the Act, 29 U.S.C. § 1823(a), provides that

> . . . each person who owns or controls a facility or real property which is used as housing for migrant agricultural workers shall be responsible for ensuring that the facility or real property complies with substantive Federal and State safety and health standards applicable to that housing.

This provision is also set forth in 29 C.F.R. § 500.130(a).

During the August 11, 1988 raid tent housing was found along the eastern border of the property. Approximately 30 to 50 tents were observed in one area, and it was estimated that about 100 persons lived in that area based on the number of bed rolls seen there. (GX B at 5:08 p.m.; JB 78; TR 50-51, 54, 62) An automobile on the property, identified as 1970 Oldsmobile Vista Cruiser station wagon, was also used for housing. (GX B at 5:32 p.m.; JB 100, 104; TR 56, 59) An occupied permanent house (also known as the "duplex") was found to be substandard due to exposed wiring, unvented gas appliances, lack of hot water, and general dilapidation. Robert Smith, a Senior Environmental Health Specialist with the Monterey County Health Department, testified that the house was not structurally adequate. Mr. Smith based his opinion, in part, on the sloping of the floors and a collapsing staircase. (TR 125) (Also see the evidence referred to in the list of cited violations at pp. 3-8, above.)

I find that the record amply establishes that on August 11, 1988 conditions on the property violated the regulations, as set forth in the list of cited violations.[6]

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[6] On September 24, 1992 I issued an "Order Denying Respondents' Motion to Exclude Evidence" in which I denied Respondents' motion to exclude or suppress the evidence obtained by the search of the house or duplex. The essence of that ruling is that Mr. Conlan had relinquished physical control of the house to Juan Marquez and therefore Respondents had no right to assert the Fourth Amendment protection against illegal search. Respondents now renew their motion based on the argument that Mr. Marquez violated alleged restrictions in his "occupancy agreement" against using the duplex as housing until maintenance and improvements were performed on it.

Respondents do not deny, and the record establishes, that farming or agricultural activity was taking place on the property on August 11, 1988. However, as noted above, Respondents argue that no violations of the Act have been proved because the evidence fails to establish that the persons who were using the housing and other facilities were migrant agricultural workers.

> "Migrant agricultural worker" is defined as—
>
> an individual who is employed in agricultural employment of a seasonal or other temporary nature, and who is required to be absent overnight from his permanent place of residence.
>
> (29 U.S.C. § 1802 (8)(A); 29 C.F.R. § 500.20(p).)

"Seasonal" agricultural employment is defined as -

> where ordinarily, the employment pertains to or is the kind exclusively performed at certain seasons or periods of the year and which, from its nature, may not be continuous or carried on throughout the year. A worker who moves from one seasonal activity to another, while employed in agriculture or performing agricultural labor, is employed on a seasonal basis even though he may continue to be employed during a major portion of the year.
>
> (29 C.F.R. § 500.20(s)(1).)

(Respondents' Post Trial Brief, p. 14) Respondents' new argument does not overcome the fact that Mr. Marquez had been given physical control of the house. Therefore, I herewith deny Respondents' renewed motion.

For a non-immigrant alien, 29 C.F.R. § 500.20(p)(2) "permanent place of residence" as -

that individual's country of origin.

One person apprehended by officials on the property during the raid on August 11, 1988 was found to be an illegal immigrant from Mexico and was sent back to Mexico on the same day. (TR 82-85, 415-416; GX C) Several officials who participated in the raid on August 11, 1988 obtained written statements from seven other persons whom they found on the property. The seven persons were described as Latin males who were dressed in clothing typical of that worn by field workers and that had strawberry stains on them. (TR 297-299, 324-331) In their written and signed statements all seven of these persons stated that they worked on the property picking strawberries. (GX L) The statement of one of the seven workers does not identify where he resided. (GS L: B-1) Two of the seven stated that they resided under the trees on the property with a total of six or seven others and that their homes were in Mexico. (GX L: B-2,4) Three of the workers stated that they resided in the town of Watsonville. (GX L: B-3, 5, 7) Another worker, Martiniano Reyes, stated that he is from Mexico, he had been living in the (permanent) house for fifteen days, and eight other people lived in the house with him. (GX L: B-6)

I find that the Government has failed to establish that the three workers who stated they lived in Watsonville meet the definition of migrant agricultural workers. Although the officials questioned and prepared statements for these three workers the statements do not identify their country of origin.

For this reason I am unwilling to draw the inference that Watsonville was not the "permanent place of residence" for these workers. On the other hand, I find that the evidence as a whole—including but not limited to the statements of the workers whose permanent place of residence was Mexico and who on August 11, 1988 lived under the trees on the property —establishes that the tents on the property had been used to house many migrant agricultural workers. In this regard, I infer from the record evidence that the workers who were seen on the property in the vicinity of the tents but who did not provide written statements were migrant agricultural workers who were housed in the tents.

Respondents argue that the Government has failed to prove that housing for migrant agricultural workers was provided "at least as to the duplex [i.e, the house]." In support of their contention Respondents state that worker Septiano Reyes stated he lived in Watsonville, and Martiniano Reyes "described himself as a permanent employee of Juan Marquez [a lessee and tenant farmer on the property]," and worker Juan Mendez "stated he was employed for two years." (Respondents' Post Trial Brief, pp. 20-21)

I have already found that the workers who stated they lived in Watsonville were not shown to have been migrant agricultural workers. This includes Septiano Reyes and Juan Mendez. However, I disagree with Respondents' assertion that Martiniano Reyes described himself as a "permanent" employee of Juan Marquez. Martiniano Reyes stated that he had worked for Marquez for one year, but the portion of his form statement to designate "Location of establishment" was left blank. Thus, there is

reason to believe that he had worked at the property for only the fifteen days he had been living in the duplex and that he had previously worked for Marquez in other temporary work. Moreover, even had this worker been employed at the property over the period of a year, he could be considered a "seasonal" strawberry picker on the property under the definition of seasonal agricultural employment in 29 C.F.R. § 500.20(s)(1). I therefore find that Martiniano Reyes was a migrant agricultural worker. Further, I infer that the other persons who lived in the duplex with Martiniano Reyes were also migrant agricultural workers.

Because migrant agricultural workers were provided housing on the property (in both the duplex and makeshift tents), Section 203(a) of the MSPA in applicable in this case. As previously determined, conditions on the property were in violation of the Act and the relevant regulations.

2. Liability of Respondents for Violations of the Act

Section 203(a) of the Act and 29 C.F.R. § 500.130(a) require a person who "owns or controls" property used as housing for migrant agricultural workers to comply with the safety and health standards.

The property was owned by Mr. Conlan's family since the turn of the century. Between 1981 and 1984 Lightning Farms, a partnership in which Mr. Conlan was a general partner, leased land from owners, including a portion of Mr. Conlan's property, and farmed it. In 1984 both Mr. Conlan and Lightning Farms filed petitions for relief pursuant to Chapter 11 of the U.S. Bankruptcy Code. Lightning Farms

was dissolved. Subsequently, Mr. Conlan was designated debtor-in-possession of the property. In this capacity Mr. Conlan leased portions of the property for farming purposes to approximately 40 tenants and received rents from the tenants. As noted, Mr. Conlan concedes that as debtor-in-possession he was the owner of the property on August 11, 1988. (TR 460-467; RX 1-4; GX O; Respondents' Post Trial Brief, p. 3) Thus, Mr. Conlan both owned and controlled the property on August 11, 1988.

The evidence does not indicate that Lightning Farms ever owned any portion of the property. And there is no evidence that Lightning Farms controlled any portion of the property after 1984. Consequently, I find that Lightning Farms is not liable for the violations on the property existing on August 11, 1988.

I also find that on August 11, 1988 Ione Conlan did not own or control the property. Mrs. Conlan did not obtain an ownership interest in the property until 1990, in connection with a divorce proceeding. (TR 460) However, the Government asserts that circumstantial evidence establishes that Mrs. Conlan exercised control over the property, *viz.*, by collecting rents, failing to provide investigators with the names of the property's lessees, and visiting a campsite on the property where she and Mr. Conlan found persons living.

Mr. Conlan testified that the rents were either received in the mail or were collected. But it has not been established how often, if ever, Mrs. Conlan participated in the collection of the rents. (TR 505) It has not been shown whether Mrs. Conlan failed to provide the names of the lessees because she knew the

identity of the tenants but chose not to provide this information, or whether she did not know the names of the tenants. (TR 307) Finally, Mrs. Conlan's visit to a campsite on the property, receiving rents and her putative knowledge of the identity of the tenants fails to establish she had control over the use to which the property could be put or the power to remove people from the property. (TR 485) I therefore find that the evidence fails to establish that Mrs. Conlan had "control" of the property within the meaning of the Act.

Based on the foregoing, Ione Conlan is not liable for the violations on the property existing on August 11, 1988.

Garth Conlan argues that, although he was the owner of the property, he is not responsible for the violations because the property was used for housing workers without his knowledge or permission. There is no evidence that Mr. Conlan had first-hand knowledge that the area of the property where tents had been set up was being used to house migrant agricultural workers. And, because the property is extensive and hilly, I find it cannot be inferred that Mr. Conlan had such knowledge.

On the other hand, the evidence of record establishes, and Mr. Conlan concedes, that he gave Juan Marquez permission to use (without cost) the permanent house as a residence for "irrigation" workers employed by Mr. Marquez to irrigate farmed areas. Mr. Conlan testified that several months before the raid he and Mr. Marquez looked at the "unit"—

> And I told him . . . that I could not repair it and bring it up to code, and if he did occupy it, or wanted to occupy it, he must. And there were

> some obvious things, the front porch, the steps, inside the floor covering had to be brought up to code and then could he could use it.

(TR 470-473) If Mr. Conlan allowed occupancy of the duplex before repairs were made, or during the time repairs were being made, there is no gainsaying that he had knowledge or scienter sufficient to satisfy even the standard he argues MSPA requires. Mr. Conlan's testimony with regard to whether he required Mr. Marquez to bring the duplex "up to code *before* if was used to house agricultural workers is both brief and contradictory. Based on Mr. Conlan's own testimony (highlighted above), it is unclear that he prohibited use of the duplex until after repairs were made. At any rate, even had Mr. Conlan prohibited occupancy of the duplex until repairs were made, it is reasonable to conclude that he had sufficient knowledge of the intended use of the duplex to satisfy the "scienter" requirement he reads into the Act. In short, Mr. Conlan's knowledge obliged him to ensure that the duplex was not occupied by workers before the repairs were made.

However, the question remains as to whether Mr. Conlan can be held responsible for the violations in the tent areas of which I have found DOL has failed to establish he had knowledge. In other words, does the Act require scienter or does it provide for strict liability: may an owner of property be held responsible for violations of MSPA despite having no knowledge that it is being used to house migrant agricultural workers?

The Government contends that the Act and the regulations impose strict liability upon the owner of

the property and that therefore proof of knowledge or intent are not required.

Mr. Conlan asserts that in no case has it been held that an owner is liable for occupation of his premises by migrant agricultural workers "without his permission or contrary to the terms of his permission." Mr. Conlan further contends that there is no indication in the legislative history of MSPA that Congress intended with an owner be liable for violations unless they occurred with his knowledge or intent. In addition, Mr. Conlan states, "A reading of the statute . . . clearly demonstrates that scienter or knowledge is required." Here Mr. Conlan relies on the language of Section 203(b)(1) of the Act, 29 U.S.C. § 1823(b)(1). (Respondents' Post Trial Brief, pp. 13-15)

Section 203(a) of the Act, 29 U.S.C. § 1823(a), contains no language requiring knowledge for the imposition of liability on one who owns or controls the facility or real property. Section 203(b)(1)—on which Mr. Conlan relies—states that a person who owns or controls property shall not "permit it to be occupied" by migrant agricultural workers without posing a certification of occupancy. Mr. Conlan argues that the dictionary definitions of "permit" are "to consent to expressly or formally," "to give leave: authorize," or "to make possible, give an opportunity: allow." (Respondent's Post Trial Brief, p. 15)

I find that Mr. Conlan's interpretation of the Act is wrong for two reasons. First, Section 203(a) does not contain the word "permit," but states only that the owner "shall be responsible." The only exception to 29 U.S.C. § 1823(a) and 29 C.F.R. § 500.130(a) is found at 29 U.S.C. § 1823(c) and 29 C.F.R. § 500.130(c), which

provide that subsection (a) does not apply to providers of housing to the general public on a commercial basis. Second, one of the meanings of "permit" to which he refers—"make possible, give an opportunity: allow"—connotes that the subject may play only a passive role. Under this definition, an owner violates Section 203(b)(1) if he allows (or "permits") his premises to be occupied simply because of his ignorance of, or inadvertence to, what is happening on his premises.

Based on the foregoing, I reject Respondents' contention that the language of MSPA makes knowledge a prerequisite for liability for violation of Section 203(a).

Contrary to Respondents' contention, the legislative history of the Act indicates Congress intended that the owner of property on which housing violations occur is responsible, without regard to his knowledge.[7] H.R. Report No. 97-885 states:

> . . .The Committee intends that this section [§ 1823(a)] be interpreted with the broadest possible meaning to ensure that the person who owns or controls the facility used as housing for migrant agricultural workers and their families is responsible for maintaining that facility in

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[7] On December 23, 1992 the California Farm Bureau Federation (CFBF) filed an *amicus curiae* brief supporting Respondents. CFBF asserts that the imposition of strict liability upon the person who owns of controls property would "wreak grave injustice" on every owner or controller of land in the country. CFBF contends that the legislative history of the Act shows that such an interpretation was no intended.

> compliance with all substantive Federal and State safety and health standards . . . .

H.R. Report No. 97-885, 97th Cong., 2nd Sess. 1, reprinted in [1982] U.S. Code Cong. & Ad. News 4547, 4563-64.

The intent of Congress not to require knowledge for liability for violating Section 203(a) can also be deduced from the fact that several other provisions of MSPA were drafted to require proof of Knowledge. See: Section 106, 29 U.S.C. § 1816 (employment of illegal aliens); Section 501(a), 29 U.S.C. § 1851 (criminal sanctions); Section 504, 29 U.S.C. § 1854 (damages for violations upon private action).

I can-find no judicial precedent regarding the question under consideration. In *Howard v. Malcolm*, 629 F. Supp. 952 (E.D.N.C. 1986), 658 F. Supp. 423 (E.D.N.C. 1987), 852 F.2d 101 (4th Cir. 1988), the owner of a migrant labor camp was held liable for substandard housing, although the camp was rented by the employer of the migrant workers. The District Court stated:

> Congress obviously intended to apply the [Act] to non-employers when selecting their statutory wording to include "each person," not simply "each agricultural employer."

Howard, 629 F. Supp. at 954. However, as Respondents point out, *Howard* is distinguishable from the instant case because in *Howard* the owner of the camp knew how it was to be used.

Respondents contend that the workers who camped on the property were trespassers who were present without their knowledge, and rely on the decision of

the California Court of Appeal in *Lucas v. Pollock*, 7 Cal. App. 4th 668 (1992), for the proposition that Respondents had "no duty or liability for the consequences of . . . unlawful occupation." (Respondents' Post Trial Brief, p. 17) I find the *Lucas* case inapposite to the instant matter as *Lucas* involved a tort action by trespassers who brought damages against the owner for personal injury and wrongful death caused by a fire in a structure they inhabited without the owner's knowledge. Indeed, the California Court held that under California tort law the owner had no duty to the trespassers to insure their "well being" and could not be liable

> even if . . . [the owner] had actual . . . knowledge of the presence of migrant encampments upon his property . . . .

Lucas at 675.

Respondents rely on the Occupational Safety and Health Act of 1970 (OSHA) which has been held to require proof of knowledge for liability for "non-serious" as well as "serious" violations of that statute. The seminal OSHA case adverted to by Respondents is *Brennan v. Occupational Safety & Health Rev. Com'n.*, 511 F.2d 1139 (9th Cir. 1975). The holding in *Brennan* is based on the Court's interpretation of the statute which specifically requires knowledge for certain violations but is silent with respect to non-serious violations all in the same section of OSHA (29 U.S.C. § 666). The Court stated:

> Considering, as we must, the statute as a whole and 29 U.S.C. § 666 in its entirety, we are convinced that Congress intended the same meaning for the word "violation" wherever it appears.

> Section (c), containing the only reference to non-serious violations must be read in conjunction with Section (b) [which refers to "serious" violations].

Brennan, 511 F.2d at 1144. Although *Brennan* also states that "fundamental fairness" requires knowledge of a violation, the holding is based on statutory interpretation not Constitutional rights. Thus, the latter discussion is *obiter dicta*.[8]

The holding in Brennan is based on its close reading of ambiguous provisions in OSHA. As discussed previously, however, MSPA Section 203(a) is not unclear. I therefor find that *Brennan* and its judicial progeny relating to OSHA are inapplicable to (and provide no guidance in answering) the question of whether MSPA requires knowledge for liability for violations of the Act.

As liability for violations of MSPA does not depend on the knowledge of the person who owns or controls the premises, and as it has been established that Garth Conlan owned and controlled the property on August 11, 1988, Garth Conlan is liable for the violations.[9]

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[8] Looking at the circumstances of the instant case strictly from the point of equity, one must conclude that Mr. Conlan is not wholly an "innocent and aggrieved" person. Mr. Conlan received a direct financial benefit from the rents paid by approximately forty tenant farmers and it is not unreasonable or unfair that he be required to ensure that his tenants not use substandard housing for their workers.

[9] Respondents complain that Garth Conlan was treated unfairly by officials of Monterey County with regard to the use of the property because they gave him singular attention and in other ways, and that DOL ignored other potentially culpable

3. The Amount of the Civil Money Penalty

DOL charged Respondents with "substantive and aggravated" violations for each of which DOL assessed a civil money penalty of $500, and "substantive and serious" violations for each of which DOL assessed a civil money penalty or $350. The penalties total $23,250. (GX D, J; ALJX 1)

Section 503(a) of the Act, 29 U.S.C. § 1853(a), states:

> (1) Subject to Paragraph (2), any person who commits a violation of this chapter or any regulation under this chapter, may be assessed a civil money penalty of not more than $1,000 for each violation.
>
> (2) In determining the amount of any penalty to be assessed under Paragraph (1), the Secretary shall take into account (A) The previous record of the person in terms of compliance with this chapter and with comparable requirements of the Farm Labor Contractor Registration Act of 1963, and the regulations promulgated under this chapter and such Act, and (B) the gravity of the violation.

The factors to be considered when determining the amount of the penalty to be assessed are listed at 29 C.F.R. § 500.143(b) which states:

> (b) In determining the amount of penalty to be assessed for any violation of the Act or these regulations the Secretary shall consider the type

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persons. (Respondents' Post Trial Brief, pp. 1-2, 4-6, 9-10). However, even if true, this provides no defense to the violations.

of violation committed and other relevant factors, including but not limited to the following:

(1) Previous history of violation or violations of this Act and the Farm Labor Contractor Registration Act;

(2) The number of workers affected by the violation or violations;

(3) The gravity of the violation or violations;

(4) Efforts made in good faith to comply with the Act;

(5) Explanation of person charged with the violation or violations;

(6) Commitment to future compliance, taking into account the public health, interest or safety, and whether the person has previously violated the Act;

(7) The extent to which the violator achieved a financial gain due to the violation, or the potential financial loss or potential injury to the workers.

The Government maintains that the factors which would reduce the amount of the penalty were duly considered prior to the assessment of the penalty. Mr. Conlan argues that, at most, only a "token" penalty should be imposed because he has no prior history of violations, the violations occurred without his knowledge or participation, he was not given an opportunity to comply with the Act, and he had taken steps to comply with the Act in the past and continues to do so in good faith. (Respondents' Post Trial Brief, pp. 21-22) Respondents have not contested DOL's

designation of the violations as either "aggravated" or "serious."

In light of the entire record and the fact that the civil money penalties imposed are far less than the $1,000 per violation which MSPA permits, I find that the civil money penalties assessed in this matter—$500 for each "aggravated" violation and $350 for each "serious" violation—are reasonable and appropriate.

ORDER

It is ORDERED that Lightning Farms and Ione Conlan be, and they hereby are, dismissed from this matter as they are not liable for the civil money penalty.

It is ORDERED that Garth Conlan pay a civil money penalty in the amount of $23,250.00 to the United States Department of Labor.

/s/ ROBERT KAPLAN
ROBERT D. KAPLAN
Administrative Law Judge

Camden, New Jersey

[Service list omitted]